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In The

Supreme Court Of The United States

October Term, 1990

STEPHEN IVY AND CHARLENE IVY,
Petitioners,

v.

ROBERT W. MYERS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief *Amicus Curiae* of the National Legal Foundation in Support of Petitioners

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SUMMARY OF ARGUMENT

Guarding individuals' right to control their tithes against governmental coercion is the cornerstone of the First Amendment's protections. This understanding is buttressed by the historical struggle for religious liberty in

Virginia. By precluding Debtors' ability to seek the protection offered by the Bankruptcy Act on the same basis as non-tithing individuals, the lower courts have imposed a civil incapacitation on Debtors on account of their religious beliefs.

The U.S. Bankruptcy Courts, charged with applying *uniform* bankruptcy laws, are in disagreement over how much the Constitution protects, or indeed if it even does protect, debtors' freedom to exercise their sincerely held religious beliefs during the life of their bankruptcy payment plan.

Prior Supreme Court holdings have consistently precluded the application of any law in such a way as to require the adherents of a sincerely held religious belief to forgo the lawful practice of their religion as a predicate to receiving a public benefit.

Petitioners' tithe is based on sincerely held religious beliefs. Inclusion of the tithe in Petitioners' disposable income would substantially burden Petitioners' free exercise rights by forcing them to choose between a

public benefit, *viz* bankruptcy, and adherence to their faith.

Granting Petitioners' application for writ of certiorari would give the Supreme Court the opportunity to restore the uniform application of the bankruptcy laws as envisioned by the Constitution and Congress.

Amicus Curiae supports the grant of the writ of certiorari.

INTEREST OF *AMICUS CURIAE*

The National Legal Foundation was constituted for the purpose of advocacy in support of a proper rendering of the First Amendment. It is a non-profit corporation organized to defend, restore and preserve constitutional liberties, family rights and other inalienable freedoms. Typically, this involves The National Legal Foundation on the side of individual plaintiffs, as in the present case, whose First Amendment freedoms are under attack by state authorities. The Court's disposition of this case could dramatically affect the ability of individuals to avail themselves of the bankruptcy laws of the United States

without being burdened in the free exercise of their religious rights.

The National Legal Foundation believes the experience of its attorneys will be of assistance to the court in evaluating this case, especially since The National Legal Foundation was *amicus curiae* in *In re Green*, the only other case decision on this matter.

I. STATEMENT OF THE CASE

The Debtors-Petitioners have filed for the protection afforded by the Bankruptcy Act.[1] The Debtors had the option of filing a petition pursuant to either Chapter 7 (liquidation) or Chapter 13 (reorganization). Because the Debtors wish to repay as much of their debts as is reasonably possible, they have elected to file a petition under the latter Chapter. This decision will have the effect of ultimately paying a greater portion of the Petitioners' debts than would have resulted from filing a petition under Chapter 7.

Prior to his bankruptcy, one of Debtors' financial responsibilities was, and continues to be, the payment of a tithe (10%) of all their income to their church. This is not a discretionary contribution, but one which their sincerely held religious beliefs make mandatory. The Bible admonishes believers to "[b]ring the whole tithe into the storehouse . . . ."[2] The New Testament, in the passage where Jesus rebukes the Pharisees for their hypocrisy,

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[1] 11 U.S.C.S. section 101 *et seq.* (Law. Co-op. 1978).

[2] Malachi 3:10. *See also* Leviticus 27:30; Deuteronomy 14:22.

reaffirms this obligation: "[Y]ou give God a tenth . . . but you neglect justice and the love of God. You should have practiced the latter without leaving the former undone."[3] Debtors have forthrightly disclosed their intent to continue fulfilling this obligation during the life of the payment plan.

The lower courts denied to the Debtors the same basis of access to the public benefits contained in the Bankruptcy Act as debtors who have a different or no religious belief. The lower courts refused to confirm the Debtors' plan because Debtors intended to continue exercising their religious beliefs by tithing. Those courts predicated Debtors' ability to obtain Chapter 13 protection on 1) forgoing their obligation to their church and violating a fundamental precept of their sincerely held religious beliefs by discontinuing their tithe, or 2) extending their payment plan beyond the time period required of debtors with either no religious belief or one that does not require tithing. Payment plans may not extend longer than three years unless the court shows

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[3] Luke 11:42.

cause.[4] The courts' clear holding was that Debtors are not entitled to a three year payment plan if they continue to avail themselves of their right to freely exercise their religious beliefs.

II. DISCUSSION

A. Questions Presented

The impact of the lower courts' rulings extend far beyond a simple denial of one debtor's ability to obtain relief from an overwhelming burden of debt. The lower courts have neglected a bedrock principle of our Nation, the guarantee that no citizen will be subjected to a unique disability on the basis of their religious beliefs. The very first liberty protected by the Bill of Rights is stated thusly: "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[5] In refusing to confirm the Debtors' payment plan, the lower courts refused to consider the First Amendment implications their decision would have. As a result, this case calls in question the continued vitality of the

[4] 11 U.S.C.S. section 1322(c) (Law. Co-op. 1978).

[5] U.S. Const. amend. I.

protection the First Amendment guarantees to every citizen regardless of which religious faith he may profess. Specifically, it raises the question whether a law may validly prohibit the free exercise of religion by requiring the Debtors to relinquish their religious beliefs by classifying their monthly tithe as disposable income. Additionally, the case raises the question whether the courts may deny those who tithe pursuant to a sincerely held religious belief the equal protection of the law by requiring their payment plans to extend further than the three years usually required of non-tithing debtors.

B. Confusion Among Lower Courts

For over ten years the Bankruptcy Courts have been struggling over how 11 U.S.C. section 1325(b)(2)[6] should apply with relation to tithes made pursuant to sincerely held religious beliefs. The silence of the Bankruptcy Act, as well as the Supreme Court, on this

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[6] "'[D]isposable income' means income which is received by the debtor and which is not reasonably necessary to be expended --

(A) for the maintenance or support of the debtor or a dependent of the debtor . . . ."

11 U.S.C.S. section 1325(b)(2) (Law. Co-op. 1978).

question has led to a situation wherein First Amendment protection in the U.S. Bankruptcy Courts is wholly dependent on the fortuitousness of the debtor's residence. The following cases are illustrative of the bankruptcy courts' confusion over how much the Constitution protects, or if it even does protect, the free exercise of religion when federal bankruptcy laws are involved.

1. In the Western District of Louisiana, First Amendment protection is not even considered in the decision to affirm or deny a payment plan. With no explanation, support, or analysis, the court declared that a 10% tithe is excessive.[7] Confirmation of the payment plan was denied, as was the debtors' right to freely exercise their religion.

2. A debtor's religious beliefs are dismissed as "entirely discretionary" in the Eastern Division of the Southern District of Ohio. In *In re Breckenridge*,[8] the court deemed that a 3%

[7] *In re Cadogan*, 4 B.R. 598 (Bkrtcy. W.D. Louisiana 1980).

[8] *In re Breckenridge*, 12 B.R. 159 (Bkrtcy. S.D. Ohio 1980).

contribution to debtor's church would be more "prudent" than the amount required by debtor's religious beliefs.

3. In Indiana, the court reduces religious beliefs to nothing more than "a noble thought and gesture."[9]

4. Even within districts there is confusion as witnessed by the disagreement between the *Breckenridge* court, *supra*, and the Bankruptcy Court sitting in the Western Division of the Southern District of Ohio wherein the court held that "allocations in a debtor's budget for . . . religious and other charitable contributions . . . have often been found by this court to be reasonably necessary . . . ."[10]

5. A tithe to the debtor's church was deemed to be excessive and "not reasonably necessary for

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[9] *In re Sturgeon*, 51 B.R. 82 (Bkrtcy. S.D. Ind. 1985).

[10] *Matter of Davis*, 68 B.R. 205, 216 (Bkrtcy. S.D. Ohio 1986).

Debtor's maintenance or support"[11] in the Delaware Bankruptcy Court. The court made no mention of the debtor's right to freely exercise his religion.

6. Although recognizing that several other courts uphold the validity of tithing as a reasonably necessary expense, the Bankruptcy Court sitting in Florida's Southern District, with no reference to the First Amendment, concluded that, in that district, tithing during the life of the debtor's payment plan would not be permitted.[12,13]

7. In one of the few bankruptcy cases where the First Amendment issues were addressed, the court held that not only would allowing the debtor to continue to tithe over the life of the

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[11] *In re Chrzanowski*, 70 B.R. 447 (Bkrtcy. D. Del. 1987).

[12] *In re Curry*, 77 B.R. 969 (Bkrtcy. S.D. Fla. 1987).

[13] As a result of the judge's holding, Mr. Curry was put to the election of 1) availing himself of Chapter 13 relief and disobeying the precepts of his religion, or 2) remaining faithful to his religious beliefs and forgoing Chapter 13 protection. This election forced Mr. Curry to convert his case to Chapter 7 liquidation. *Id.*

payment plan not be a violation of the Establishment clause, it would be an affirmation of the Free Exercise clause.[14] Therefore, in the Western District of Michigan, the debtors' constitutionally guaranteed rights are protected.

8. Similarly, in the Eastern District of Pennsylvania the Bankruptcy Court concluded that tithing does not violate the creditor's rights under the Establishment clause.[15] The payment plan, including the debtor's tithe, was affirmed.

9. In *In re Bien* the court, after analyzing numerous case precedents, found that the debtor's tithe was a "proper item of proposed budget expense."[16] Therefore, in Connecticut too, First Amendment rights are protected by the Bankruptcy Courts.

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[14] *In re Green*, 73 B.R. 893 (Bkrtcy. W.D. Mich. 1987).

[15] *In re Navarro*, 83 B.R. 348 (Bkrtcy. E.D. Pa. 1988).

[16] *In re Bien*, 95 B.R. 281 (Bkrtcy. D. Conn. 1989).

The United States Constitution gives Congress the authority to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[17] As evidenced by the cases cited *supra*, the lower courts' understanding of the laws with regard to this issue is anything but uniform. This Court, by hearing this case, would have an excellent opportunity to make a uniform statement that the protections afforded by the Bill of Rights are available to all bankrupt citizens of the United States, regardless of their residence.

C. Federal Issue Presented

Virginia as an Example of the Importance of Religious Freedom

The freedom of religion is paramount amongst the freedoms enjoyed by the American people today. In considering the importance of this freedom, this Court has looked to Virginia's struggle for religious freedom as indicative: "[t]his Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such

[17] U.S. Const. art. I , section 8, cl. 4.

leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."[18] In his famous Memorial and Remonstrance Against Religious Assessments, which Madison wrote in response to a tax bill levying assessments to support religious teachers, he asserted:

> we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate .... This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.[19]

This freedom to discharge the duty each owes to their Creator was deemed to be so important it was codified in the *Virginia Statute for Religious Freedom*, the statute to which Justice Black referred in *Everson*,[20] which assailed any governmental interference with a citizen's right to support the church of his choice by stating:

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[18] *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1946).

[19] 8 J. Madison, *The Papers of James Madison* 299 (Rutland & Rachel ed. 1973).

[20] 330 U.S. 1, 12-13 (1946).

> [w]hereas Almighty God hath created the mind free; that *all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness*, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . .; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern. . . .
>
> Be it enacted by the General Assembly that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, *or shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief* . . . .[21]

The lower courts impose a civil incapacitation on Debtors by refusing them a public right that would be otherwise available to them if they abandoned their religion. Debtors are being made to "suffer on account of . . . [their] religious opinions or belief" by virtue of the lower courts' rulings that their obedience to the commands of Jesus Christ[22] deprives them of equal access to bankruptcy protection.

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[21] Va. Code section 57-1 (1986) (enacted January 16, 1786).

[22] *See supra* notes 2-3.

It is specifically the Debtors' right to discharge the duty they owe to their Creator which the lower courts seek to direct by force, exactly as Madison feared the government might do. In holding as the lower courts do, they deny the heritage of religious freedom embodied in Virginia's religious freedom statute. Instead of recognizing, as did Justice Douglas in *Zorach v. Clauson*, that "[w]e make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary [and that] [w]e sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish,"[23] the lower courts have, in effect, restricted the beliefs and creeds to which Americans may subscribe and still retain the benefits of the laws of the United States. The Court's historic protection of Americans' sincerely held religious beliefs is needed in this case to prevent erosion of the Bill of Rights' continuing vitality.

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[23] *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Facially Neutral Regulations

The Bankruptcy Act does not, by its terms, restrict the free exercise of religion. However, this Court has previously held that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[24] What is unduly burdensome has been defined to be:

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.[25]

Furthermore, not only may the state not condition receipt of government benefits upon the adherent's performance of an activity repugnant to his religious beliefs, the state may also not condition the receipt of that benefit upon the adherent's disavowal of a legal activity required by his religion.[26]

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[24] *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

[25] *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 717 (1981).

[26] *Employment Div. v. Smith*, 494 U.S. ___, 108 L.Ed.2d 876, 884, 110 S.Ct. ___ (1990).

Here the lower courts asked Debtors to choose between adherence to their faith, by tithing to their church, and receiving an important benefit from the government, viz, the protection of Chapter 13 bankruptcy proceedings. "If the purpose or effect of a law [here a lower court ruling] is to impede the observance of one or all religions . . . , that law is constitutionally invalid even though the burden may be characterized as being only indirect."[27] In considering whether a law could predicate its benefits on the intended beneficiary's disavowal of religiously required conduct, the *Smith* court concluded that "a state could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion. As we observed in *Smith I*, however, the conduct in those cases was not prohibited by law. We held that distinction to be critical."[28] Tithing is not an illegal activity and the law may therefore not require Debtors to forgo the conduct required by their religion.

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[27] *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

[28] 494 U.S. ___, 108 L.Ed.2d 876, 884.

The lower courts' rulings are contrary to the weight and intent of this Court's prior holdings as well as the Constitution's direct prohibition on the abridgement of the right to freely exercise one's religion. Additionally, since we may assume that Congress intends to follow the Constitution's mandates when it passes legislation, the lower courts' rulings frustrate Congress' attempt to pass uniform laws with respect to the subject of bankruptcies.

D. Need for Supreme Court Review

Religious freedom has traditionally been one of the most jealously guarded freedoms held by the American people. The lower courts have denied the Debtors' right to follow the mandates of their sincerely held religious beliefs. The cases cited, *supra*, show that there are few issues that this Court has ever dealt with that are as important as the protection of this First Amendment guarantee.

The lower courts are in confusion over how they should apply a constitutionally guaranteed freedom in the context of bankruptcy proceedings. As noted, a debtor's right to freely exercise his religious beliefs is currently

wholly dependent upon where he happens to live. When the Framers gave Congress the power to pass laws regarding the subject of bankruptcies, they stated that they were to be uniform. The courts, whose duty it is to state what the law is, must express uniform opinions. If they do not, then bankruptcy law is not uniform. The only way to restore this uniformity is for the Supreme Court to hear this case and decide what will be the proper rule of law with regard to this issue.

The lower court rulings are in contravention to many of this Court's holdings with regard to the constitutionality of laws that are applied in such a way as to create a burden on the exercise of a person's religion. This abridgement will continue unchecked if this Court does not take this opportunity to put this situation aright.

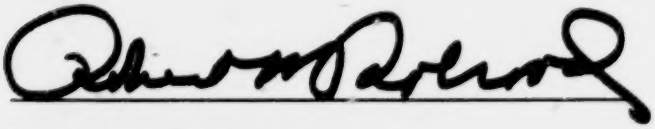
The chances are slim that this Court will have another opportunity to address this issue. Those who are in need of the protection afforded by the bankruptcy laws are rarely in a position to appeal a case as far as the Supreme Court. It is not likely that there will be another

debtor who has the resources to accomplish this task who has also had his rights abridged in this manner.

III. CONCLUSION

For the aforementioned reasons, the petition for a writ of certiorari should be granted.

Respectfully subimitted,



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